No. 350959

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JAMES COURTNEY and CLIFFORD COURTNEY, Appellants,

v.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; DAVID DANNER, chairman and commissioner, ANN RENDAHL, commissioner, and JAY BALASBAS, commissioner, in their official capacities as officers and members of the Washington Utilities and Transportation Commission; and STEVEN KING, in his official capacity as executive director of the Washington Utilities and Transportation Commission, Respondents,

and

ARROW LAUNCH SERVICE, INC., Intervenor-Respondent.

REPLY BRIEF OF APPELLANTS JAMES AND CLIFFORD COURTNEY

Michael E. Bindas, WSBA # 31590
INSTITUTE FOR JUSTICE
10500 N.E. 8th Street, Suite 1760
Bellevue, WA 98004
Telephone: (425) 646-9300
Facsimile: (425) 990-6500
Email: mbindas@ij.org

Attorney for Appellants
James and Clifford Courtney

TABLE OF CONTENTS

TABLE OF CONTENTS - CONTINUED

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES - CONTINUED

TABLE OF AUTHORITIES - CONTINUED

TABLE OF AUTHORITIES - CONTINUED

STATUTES AND CONSTITUTIONAL PROVISIONS

REGULATIONS

TABLE OF AUTHORITIES - CONTINUED

OTHER AUTHORITIES

I. INTRODUCTION

In their opening brief, appellants James and Clifford Courtney (hereinafter "the Courtneys") demonstrated that their proposed boat services, all of which would be limited to customers of a specific business or group of businesses, are not "for the public use" and therefore should not require a certificate of public convenience and necessity (hereinafter "PCN"). They further demonstrated the arbitrariness and capriciousness of the contrary conclusion reached by the Washington Utilities and Transportation Commission (hereinafter "WUTC"). Nothing in the response briefs of the WUTC and Intervenor-Respondent Arrow Launch Service, Inc. (hereinafter "Arrow Launch") undermines the Courtneys' arguments. This Court should therefore enter a declaratory judgment holding that a PCN certificate is not required for any of the proposed services, which, for the Court's reference, are summarized as follows:

1. Transportation for customers with a reservation for lodging at Stehekin Valley Ranch.

2. Transportation for customers with a reservation for lodging at Stehekin Valley Ranch and customers with a reservation for other activities that the ranch offers.

3. Transportation for customers with a reservation for activities or services at Courtney-family businesses.

4. Transportation for customers with a reservation for activities or services at Stehekin-based businesses that have retained the Courtneys to transport their customers.

5. Transportation by charter agreement with a Stehekin-based travel company for customers who have purchased a travel package from the travel company.

II. *ENGLAND* RESERVATION

The Courtneys reiterate their reservation pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), and thus: (1) apprise this Court of the pendency of *Courtney v. Danner*, over which the U.S. District Court for the Eastern District of Washington has exercised *Pullman* abstention and retained jurisdiction, *see* CP 252-54; (2) state their intention, and reserve their right, to return to federal court to litigate their federal Privileges or Immunities Clause claim and any other federal issues after resolution of state proceedings; and (3) state that they will not litigate the constitutionality of the PCN requirement in this Court.

III. CORRECTIONS TO FACTUAL/PROCEDURAL MISCHARACTERIZATIONS

Before the Courtneys respond to the WUTC's and Arrow Launch's arguments, they must correct certain factual and procedural

mischaracterizations that the WUTC and Arrow Launch make in their respective briefs.

A. The Courtneys' Services Are Not As Broad As The WUTC Contends

The WUTC mischaracterizes some of the boat services that the Courtneys propose, hoping to broaden the scope of those services into something "public." The Courtneys' proposals, however, are not nearly as broad as the WUTC maintains.

For example, the WUTC mischaracterizes the service at issue in the Courtneys' second proposal as open to "anybody who reserves kayaking, hiking, camping, or horseback riding excursions through Stehekin Outfitters." Br. Resp't WUTC at 6 (hereinafter "WUTC Br."). As made clear in the Courtneys' petition for a declaratory order and the Declaratory Order itself, the service would be limited to "lodging customers with reservations for Stehekin Valley Ranch" and "customers with reservations for other activities that *the ranch* offers." CP 62 (emphasis added); *see also* CP 429 (¶ 2). Although the activities could include those "operated by the ranch itself" or those "originating at the ranch" but operated by another entity, such as Stehekin Outfitters, in either case, the activities would be offered by and originate at Stehekin Valley Ranch alone. CP 62.

The WUTC similarly mischaracterizes the Courtneys' third and fourth proposals, claiming they would provide boat transportation to "anybody who *intends* to patronize" Courtney-family businesses and "anybody who *intends* to patronize any Stehekin-based business." WUTC Br. at 7 (emphasis added). These services would be solely for *confirmed* customers—that is, customers "with reservations for" activities or services at a Courtney-family business or Stehekin-based business that has contracted to use the service to provide transportation for its customers. CP 64, 66. The customers, moreover, would be required to provide proof of their reservation when boarding. *See* CP 65, 67.

Finally, the WUTC also mischaracterizes the relief the Courtneys seek, claiming they seek to operate an "unregulated" service. WUTC Br. at 1, 5. The Courtneys seek no such thing. They have repeatedly made clear that they do not take issue with legitimate health and safety regulations, such as insurance and inspection requirements. *See, e.g.*, CP 62, 64, 66, 68, 70, 87, 338. Their petition for a declaratory order was concerned with the applicability of the PCN requirement alone. CP 45.

B. The Ninth Circuit Did Not Hold That The Courtneys Lack A Constitutional Right To Provide The Services At Issue

Arrow Launch, meanwhile, mischaracterizes the Ninth Circuit's decision in *Courtney v. Goltz*, 736 F.3d 1152 (9th Cir. 2013). That

decision concerned whether the WUTC's PCN requirement—as applied to the provision of (1) "public ferry service on Lake Chelan," *id.* at 1155 (CP 229), and (2) "private boat services" on Lake Chelan "for patrons of specific businesses or groups of businesses," *id.* at 1162 (CP 245)—violates the Privileges or Immunities Clause of the Fourteenth Amendment, which protects the "right to use the navigable waters of the United States," *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873). In arguing that the Ninth Circuit's decision supports its position, Arrow Launch conflates these two as-applied claims into one, asserting that the Ninth Circuit held "there is no right under the clause to conduct ferry operations." Arrow Launch Br. at 24.

The Ninth Circuit, however, only resolved the Courtneys' first claim, "hold[ing] that the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a *public* ferry on Lake Chelan." *Courtney*, 736 F.3d at 1162 (CP 244) (emphasis added). It did not resolve the second claim; rather, it, like the district court, "declined to express an opinion as to whether the right to use the navigable waters of the United States covers the use of such waters for *private* boat services for patrons of specific businesses or groups of businesses." *Id.* at 1162 (CP 245) (emphasis added).

The Ninth Circuit declined to resolve the second claim because it was unsure "whether the PCN requirement applies to the private boat transportation services the Courtneys wish to provide." *Id.* at 1163 (CP 248). It accordingly exercised *Pullman* abstention and retained federal jurisdiction over the claim so that the Courtneys could request a declaratory order on that question from the WUTC and, if necessary, seek review in the Washington courts. *Id.* at 1163, 1164 (CP 247, 249). It did not, as Arrow Launch suggests, hold that the Courtneys have no federal constitutional right to operate the services at issue here.

IV. STANDARD OF JUDICIAL REVIEW

Hoping to restrict the scope of this Court's review, Arrow Launch maintains that the ultimate inquiry in this case—whether the proposed boat services are "for the public use"—is a question of fact, rather than one of law. Arrow Launch Br. at 9. Tellingly, the WUTC does not join this argument, which Arrow Launch has never before raised in this litigation. That is for good reason: it is meritless. As the administrative law judge who presided over the declaratory order proceeding explained, the WUTC was "looking strictly at the *legal* issue that [was] presented in the petition." CP 450 (emphasis added). Likewise, in conducting its judicial review of the Declaratory Order, the Chelan County Superior Court explained: (1) that "[t]his matter involves review of a declaratory

order based on a set of *undisputed* hypothetical facts"; and (2) that it was therefore reviewing the WUTC's "conclusions of *law* . . . de novo." CP 687 (emphasis added). The only authority Arrow Launch cites for its contrary position is a statute governing "classification proceedings," which has no application to declaratory order proceedings. *See* Arrow Launch Br. at 8 (citing RCW 81.04.510). De novo review is therefore warranted. *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994); *Wash. Indep. Tel. Ass'n v. WUTC*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003).

V. ARGUMENT

Nothing that the WUTC and Arrow Launch have argued in their respective briefs changes the fact that the Courtneys are entitled to the relief they request. The services the Courtneys wish to provide are not "for the public use," and the Declaratory Order is arbitrary and capricious insofar as it: (1) exempts certain private carriers from the need to obtain a PCN certificate, while demanding one for the Courtneys' analogous services; and (2) refuses to apply the WUTC's "charter service" exemption to the service at issue in the Courtneys' fifth proposal.

A. The Courtneys' Proposed Services Are Not For The Public Use

As the Courtneys made clear in their opening brief, the services they wish to offer are not "for the public use," *see* Opening Br. at 27-42,

and the arguments that the WUTC and Arrow Launch make to the contrary are baseless. First, service restricted to customers of a particular business or group of businesses is not, as the WUTC maintains, for the "public use" by any plain reading of that term. Second, contrary to Arrow Launch's contention, eminent domain jurisprudence supports the conclusion that such service is not for the "public use." Third, the restricted nature of the Courtneys' proposed services is not, as Arrow Launch insists, a subterfuge for a public ferry. Fourth, the WUTC's argument that certain characteristics of the Courtneys' proposed services render the services public is groundless. Finally, the Washington Constitution's abhorrence of monopolies militates in favor of the Courtneys' request for relief, despite the WUTC's contrary argument.

1. The Proposed Services Are Not For The "Public Use" Under The Plain Meaning Of That Term

As the Courtneys argued in their opening brief, a plain reading of the relevant statute makes clear that the transportation they wish to provide—solely for customers of a particular business or group of businesses—is not for the "public use" because it would not be open and available for all to use. *See* Opening Br. at 28-37. At the start of its response brief, the WUTC seems to agree, asserting that "a commercial ferry operates 'for the public use' if it is accessible on a nondiscriminatory

basis to all who desire its use." WUTC Br. at 16. Unfortunately, however, the WUTC does not stop there, as it should. Instead, it posits that "public" can also mean "accessible to all members of the community" and that the relevant "community" in this case is "people linked by a common desire to visit Stehekin and to patronize [the] businesses" that the Courtneys' proposals would serve. WUTC Br. at 16.

The first problem with the WUTC's argument is that the term "community" appears nowhere in the PCN statute—a point that the Courtneys noted in their opening brief and that the WUTC does not dispute. Opening Br. at 29.

The second problem is that the WUTC's argument is tautological. In essence, the argument is this: the Courtneys' proposed services are "public" because "public" means "community," and "community" means the people who would use the Courtneys' proposed services. These are the same linguistic gymnastics the WUTC employed in the Declaratory Order. *See* CP 432-33 (¶¶ 11-12). For the reasons set forth in the Courtneys' opening brief, *see* Opening Br. at 29-31, this Court should reject them and instead apply the straightforward, commonsense definition of "public" employed by Black's Law Dictionary and adopted only five years ago by the Washington Supreme Court in *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285 P.3d 860 (2012): namely, "[o]pen

or available for all to use, share, or enjoy." *Id.* at 285 (quoting *Black's Law Dictionary* 1348 (9th ed. 2009)). By this commonsense definition, the Courtneys' proposed services are certainly not for the "public use."

While the WUTC attempts to distinguish *Cregan*, its efforts fail. In *Cregan*, the court concluded that a camp was open for private, rather than public, use. The WUTC maintains that the determinative fact that rendered the camp private was that the owner had excluded certain groups from using it based on "religious affiliation," which the Courtneys do not propose to do. WUTC Br. at 20. This supposed distinction is no distinction at all. The Washington Supreme Court held that the camp was limited to "private," rather than "public," use because the owner had "allow[ed] only select groups" to use it. *Cregan*, 175 Wn.2d at 285, 286. There was nothing special about religion that factored into the decision, and the fact that the "select groups" were those with certain religious affiliations was beside the point. In fact, the court did not even mention religious affiliation in its analysis until the final paragraph, after having discussed the concept of public vs. private use at length. The determinative fact was that the camp was not "[o]pen or available for all to

use, share, or enjoy," *id.* at 285 (quoting *Black's Law Dictionary* 1348 (9th ed. 2009)), and the same is true here.[1]

Undeterred, the WUTC cites *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 36 S. Ct. 583, 60 L. Ed. 984 (1916), for the proposition that "public" does not mean "everybody, all the time." WUTC Br. at 17. It is disingenuous, however, for the WUTC to rely on that case, because both the WUTC and the Washington Legislature have elsewhere *rejected* its reasoning. Whereas *Terminal Taxicab* held that taxi service for hotel guests was subject to the jurisdiction of the Public Utilities Commission of the District of Columbia, the WUTC and Washington Legislature have expressly *exempted* taxis and hotel shuttles from the WUTC's jurisdiction. RCW 81.68.015 ("This chapter does not apply to corporations or persons . . . insofar as they own, control, operate, or manage taxicabs [or] hotel buses . . . ."); WAC 480-30-011(6) ("The commission does not regulate . .

[1] Arrow Launch also attempts to distinguish *Cregan*, claiming the statute at issue in that case was "in derogation of common law" and that, therefore, the term "public" as used in it had to "be strictly construed." Arrow Launch Br. at 14. In *this* case, Arrow Launch argues, the Court should adopt a "*liberal* construction," Arrow Launch Br. at 15, such as that given the Washington Law Against Discrimination (hereinafter "WLAD") in *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 59 P.3d 655 (2002). *Cregan*, however, says nothing about a "strict" construction of the term "public"; rather, the court ascribed the term its "plain meaning." *Cregan*, 175 Wn.2d at 285. And in *Fraternal Order of Eagles*, the Legislature had expressly *mandated* the "liberal construction" that the court gave the WLAD. *Fraternal Order of Eagles*, 148 Wn.2d at 247 ("The WLAD requires liberal construction of its provisions . . . .") (citing RCW 49.60.020); *id.* at 255 ("The Legislature mandated not only a liberal interpretation of the WLAD, it also intended a liberal reading of what constitutes a 'public accommodation.'"). Here, there is no such mandate.

. [p]ersons owning, operating, controlling, or managing taxi cabs [or] hotel buses . . . .").

In any event, the Courtneys, in their opening brief, listed four factors that informed the Court's decision in *Terminal Taxicab*—factors that are absent in this case and, therefore, distinguish it from *Terminal Taxicab*. *See* Opening Br. at 34-37. The WUTC does not even acknowledge, much less try to explain away, these distinctions—distinctions that place the Courtneys' proposed services squarely outside of *Terminal Taxicab*'s purview.[2]

2. Eminent Domain Case Law Supports The Courtneys' Position

Arrow Launch, meanwhile, claims to find support for the WUTC's interpretation of "public use" in eminent domain case law construing the term. *See* Arrow Launch Br. at 16-19. But here, again, the case law supports the Courtneys—not Arrow Launch or the WUTC.

---

[2] The WUTC also relies on *Surface Transportation Corp. of New York v. Reservoir Bus Lines, Inc.*, 271 A.D. 556, 67 N.Y.S.2d 135 (N.Y. App. Div. 1946), concerning bus service for residents of apartment buildings in New York. That opinion, however, is just a reflexive application of *Terminal Taxicab*. Moreover, the bus service at issue in the case actively solicited new business from "numerous" residential apartment buildings in an area of New York comprised almost exclusively of apartment buildings; not surprisingly, the court, in concluding the service was for "the use and convenience of the public," feared the company would soon be "transporting every person who live[d] in the area." *Id.* at 558, 561-62. Here, on the other hand, there is no such risk, as three of the Courtneys' proposals would be limited to registered customers of a *single* business—Stehekin Valley Ranch or the Stehekin-based travel company—and another would be limited exclusively to customers of businesses owned by Courtney family members.

As noted in the Courtneys' opening brief, a hotel, retail establishment, restaurant, or similar business is not a "public use" under Washington eminent domain law. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 616 n.1, 639, 121 P.3d 1166 (2005); *In re Petition of Seattle*, 96 Wn.2d 616, 629, 633-34, 638 P.2d 549 (1981). Neither Arrow Launch nor the WUTC disputes this fact. If such a business is not a "public use," transportation restricted solely for confirmed customers of such a business also is not a public use. *See* Opening Br. at 33-34 & nn. 7-8; *see also Robinson Twp. v. Commonwealth*, 147 A.3d. 536, 583-88 (Pa. 2016) (invalidating a statute that allowed natural gas companies to use eminent domain to store gas because the statute did not restrict the eminent domain power to true public utilities—that is, companies furnishing gas "for the public").

Undeterred, Arrow Launch argues that "public use" should be defined instead as "public benefit." Arrow Launch Br. at 17-18. It relies on two eminent domain cases to support its position. Neither does.

The first case is the near-universally condemned *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 439 (2005). Although *Kelo* effectively equates "public use" with "public benefit" for purposes of *federal* eminent domain law, *id*. at 483-84, the Washington Supreme Court has rightly run from that decision in interpreting our own

state constitution, stating that the use found to be "public" in *Kelo* was not a "fundamental public use[] for which property can be condemned." *HTK Mgmt., L.L.C.*, 155 Wash. 2d at 639; *see also id.* at 616 n.1. This Court should not embrace what the Washington Supreme Court has rebuffed.

The second eminent domain case on which Arrow Launch relies is *Miller v. City of Tacoma*, 61 Wn.2d 374, 378 P.2d 464 (1963). The majority in *Miller*, however, never equated "public use" with "public benefit"; the dissent only charged it with doing so. *See id.* at 396-97 (Rosellini, J., dissenting). Moreover, since *Miller*, the Washington Supreme Court has repeatedly held that although a "project provided a public benefit, it did not constitute a public use and therefore, the [government's] power of eminent domain could not be invoked." *Dickgieser v. State*, 153 Wn.2d 530, 536-38, 105 P.3d 26 (2005) (collecting cases). This Court, too, should therefore reject Arrow Launch's attempt to supplant the "public use" requirement with a more permissive "public benefit" threshold.

3. The Courtneys' Restriction Of Their Proposed Services Is Not A Subterfuge For A Public Ferry

Arrow Launch next maintains that "limiting . . . service to specific groups of people," as the Courtneys would do, is nothing more than a

"subterfuge or evasion of the law" to avoid classification as a public ferry. Arrow Launch Br. at 26.[3] It is not.

In support of its argument, Arrow Launch relies on *Kitsap County Transportation Co. v. Manitou Beach-Agate Pass Ferry Association*, 176 Wash. 486, 30 P.2d 233 (1934), but that case has no bearing here. In *Kitsap*, an "association" formed for the sole purpose of securing, for its members, transportation between Seattle and Bainbridge Island. *Id.* at 494. The association then retained a boat company to make "ten round trips daily" and claimed the arrangement was a private, rather than public, ferry because ridership was limited to the association's members. *Id.* The court rejected the argument that the service was private, finding it instead to be a "pretense" for a public ferry. *Id.* at 495. Although ridership was limited to members of the "association," the court noted, membership in the association was "open to all who might desire transportation between Seattle and Bainbridge," and the association's sole purpose was to funnel passengers to the ferry. *Id.* at 494; *see also id.* at 495 ("[I]t is quite apparent that, stripped of pretense, the transaction was one whereby the

[3] Arrow Launch's brief is littered with charges that the Courtneys' efforts to operate a boat transportation service are "subterfuge," "manipulation," "evasion," "pretense," and a "sham." *E.g.*, Arrow Launch Br. at 26, 29, 40, 42. They are no such thing. On the Ninth Circuit's guidance, the Courtneys petitioned for a declaratory order to determine what, if any, service they may provide without a PCN certificate. They have gone about the entire process openly and transparently, telling all involved exactly what they intend to do. There is nothing untoward about their efforts.

Puget Sound Navigation Company was to furnish the boat and the ferry association was to furnish the passengers."). That is a far cry from this case, where ridership would be limited to confirmed customers of specific businesses that do other things besides run ferries. Here, the boat would run only as needed by those businesses.

Arrow Launch next turns to *Vallejo Ferry Co. v. Solano Aquatic Club*, 165 Cal. 255, 131 P. 864 (1913), but fares no better with that case. Like *Kitsap County Transportation Company*, it involved an organization that formed for the very purpose of securing boat transportation for its members and then claimed it was not operating a public ferry precisely because ridership was restricted to its members. *Id.* at 262. The by-laws of the organization, however, "expressly thr[e]w the membership open to the general public." *Id.* at 262-63. Not surprisingly, the court concluded the ferry was public, not private, because the organization was a "sham" that would "take into its so-called membership as many individuals as it c[ould] transport"—individuals who would be entitled to "practically unlimited use of [the] ferry" for a $2 monthly charge. *Id.* at 262-64. The case thus has nothing to say about the boat transportation at issue here, which would be a *bona fide*, meaningfully limited service—not a "sham."

Arrow Launch is equally unsuccessful with *Lloyd v. Haugh & Keenan Storage & Transfer Co.*, 223 Pa. 148, 72 A. 516 (1909), and

Cushing v. White, 101 Wash. 172, 172 P. 229 (1918), which it also cites for the proposition that limiting transportation service does not render it private. *See* Arrow Launch Br. at 33-34. Unlike the Courtneys' proposed services, the transportation companies in those cases did not limit their services to a discrete group. Rather, they argued that because they reserved a generalized right to deny service to individual customers, they were private, rather than public, carriers. *Cushing*, 101 Wash. at 173; *Lloyd*, 223 Pa. at 153-54. The courts in both cases disagreed because the carriers "h[e]ld[] themselves out to the public as ready and willing to serve indiscriminately all who may desire the use of their facilities." *Cushing*, 101 Wash. at 182; *see also Lloyd*, 223 Pa. at 154 (holding service was a common carrier because it "advertised [its] business in a way to solicit custom from the general public" and "h[e]ld[] itself in readiness to engage with any one who might apply"). Here, by contrast, the Courtneys' services would be limited to a discrete group of persons—customers of a specific business or group of businesses—and the Courtneys would not hold themselves out as willing to serve anybody else, much less the general public.

Interestingly, the WUTC disagrees with Arrow Launch and suggests that a reserved right to refuse service to specific individuals *is* sufficient to render a carrier private. It does so in attempting to distinguish

Meisner v. Detroit, Belle Isle & Windsor Ferry Co., 154 Mich. 545, 118 N.W. 14 (Mich. 1908), in which the Michigan Supreme Court held that a boat transportation service that an amusement park provided for its customers to travel to and from the park was a private, rather than common, carrier. *Id.* at 548-49. According to the WUTC, it was not the fact that transportation was restricted to customers of the amusement park that rendered the boat service private, but rather the fact that the operator "reserved the right to 'exclude the rough, boisterous, and rowdyish element from its boats and grounds.'"[4] WUTC Br. at 26 (quoting *Meisner*, 154 Mich. at 548). The WUTC asserts that "the Courtneys have reserved to themselves no means to select their clientele" like the boat operator in *Meisner* did and that, therefore, their services would be public, not private. WUTC Br. at 26.

The WUTC's argument is at once factually inaccurate and legally perverse. It is inaccurate because the WUTC asked the Courtneys if their proposed services were "like the Michigan case" (*i.e.*, *Meisner*) in that they would be able to turn away objectionable customers, and the Courtneys answered that "there might be some situations in which Mr.

[4] Specifically, the boat operator "reserve[d] the right to refuse to accept tickets sold or furnished to any person whom they believe to be possible objectionable passengers." *Meisner*, 154 Mich. at 546 (reporter's note). The case arose after a would-be passenger was refused admission onto the boat because, "on a former occasion[,] he had engaged in a disturbance upon the boat to the annoyance of passengers and crew." *Id.*

Courtney might . . . not welcome" someone on the boat—for example, if he "had previously been destructive . . . at the Lodge." CP 466, 467. And the WUTC's argument is perverse because its implication is that a public ferry, such as the one operated by Intervenor Arrow Launch, *must* transport the "rough, boisterous, and rowdyish" and could not, for example, turn away a drunk person who is a threat to himself and other passengers. Obviously, this is not the law. *See, e.g.*, Sara Jean Green, *Woman charged after wild brawl leads captain to turn Bremerton ferry around*, Seattle Times, Oct. 18, 2016 (reporting that Washington State Ferries turned a Bremerton-to-Seattle ferry around to remove an unruly passenger).

4. The WUTC And Arrow Launch's Argument That Specific Characteristics Of The Courtneys' Proposed Services Render Them Public Is Groundless

The WUTC's next tack is to attribute certain characteristics to the Courtneys' proposed services that, the WUTC says, render them public—for example, that the services would be owned separately from the businesses they serve, charge a fare, and operate for profit. These traits that the WUTC ascribes to the Courtneys' services are either false or irrelevant . . . and sometimes both.

a. That Some Of The Proposed Services Would Not Be Owned By The Businesses They Serve Is Irrelevant

The WUTC is wrong in its assertion that all of the services the Courtneys propose would necessarily be owned separately from the businesses they serve. *See* WUTC Br. at 25. While that may be true (and irrelevant) with respect to the Courtneys' third, fourth, and fifth proposals, there is no support in the record for the WUTC's attempt to sever the first and second proposals—boat transportation for customers with reservations for lodging or activities at Cliff Courtney's Stehekin Valley Ranch—from the ranch itself. *See* WUTC Br. at 6 (asserting that, in the first and second proposals, "Clifford Courtney will own the boat transportation service as a separate entity"). Rather, when the WUTC asked about this point during the declaratory order proceeding, the Courtneys explained:

> Cliff Courtney owns Stehekin Valley Ranch, Cliff Courtney would own this service. . . . We have pled in Paragraph 74 that the boat transportation service would be owned by Cliff Courtney, and in 75, that Stehekin Valley Ranch is owned by Cliff Courtney. We have pled that there would be common ownership here.

CP 475.[5]

[5] The Courtneys did not state that Stehekin Valley Ranch, LLC—of which Cliff and his wife are the sole members, CP 47—would be the specific organizational form under which the boat services fell. But to the extent that such organizational form is critical to ensuring the services would not be "for the public use,' this Court could simply make that form a condition of its order holding that a PCN certificate is not required. As discussed below, however, the specific organizational form is not even relevant.

In any event, common ownership is not even relevant to the question before this Court: whether the Courtneys' proposed services would be "for the public use." The WUTC cites two cases for the proposition that it *is* relevant, but neither case supports the WUTC's position.

The first case is *State ex rel. Public Utilities Commission of Utah v. Nelson*, 65 Utah 457, 238 P. 237 (1925), which the Courtneys discussed in their opening brief. In *Nelson*, a private campground operator contracted for bus service to make two round trips daily to transport its customers to and from the campground (which, similarly to this case, was located in a national forest). *Id.* at 459-60. Like Lake Chelan, a canyon highway was the "only accessible pass to and from the camp." *Id.* at 460. The Utah Supreme Court held that such transportation did not require a PCN certificate. *Id.* at 464.

The WUTC attempts to distinguish *Nelson* on the ground that the bus transportation "was a mere appendage to the campground that it served," whereas, here, "the proposed boat transportation services will be independent" businesses. WUTC Br. at 27. The WUTC's attempt to distinguish *Nelson* is factually incorrect: the campground operator did not provide the bus transportation itself, but rather contracted out for it. *Nelson*, 65 Utah at 460 ("[T]o accommodate its guests and persons

attending the camp, the association entered into a contract with the defendant . . . to carry . . . passengers, between Salt Lake City and the camp, making two trips a day.").

Thus, the critical question in *Nelson* was not the precise ownership arrangement of the bus service, but rather whether or not it would be available to all members of the public. "[A] common or public carrier," the court explained, "is one who, by virtue of his business or calling or holding out, undertakes for compensation to transport persons or property, or both, from one place to another for *all such as may choose to employ him*"; the "dominant element [is] of public service, serving and carrying *all persons indifferently who apply for passage*." *Id.* at 461-62 (emphasis added). By contrast, the Courtneys, like the bus operator in *Nelson*, would "not hold [themselves] out to carry, nor . . . [be] engaged in carrying, any and all persons who desire[] to travel." *Nelson*, 65 Utah at 464. Their services therefore would be neither public nor a common carrier.

The second case that the WUTC claims supports its common ownership position is *Self v. Dunn & Brown*, 42 Ga. 528 (1871), which the Courtneys also discussed in their opening brief. In *Self*, the Georgia Supreme Court held that boat transportation provided by a mill owner for customers of the mill was a "private ferry." *Id.* at 530-31. The WUTC insists that to fit within this holding, the business served by the boat

transportation service must itself own the boat transportation service (presumably under the same organizational form). *See* WUTC Br. at 25. The court's opinion in *Self*, however, did not say anything about the ownership arrangement of the boat in that case, much less make it a condition of its holding. Rather, the court focused on the fact that the boat service was an "accommodation of the mill-owner to his customers." *Self*, 42 Ga. at 531. The same would be true here.

In short, whether or not the Courtneys' proposed services would be owned separately from the businesses they serve is irrelevant to the question at issue in this case: whether the services would be "for the public use." Interestingly, the WUTC seems to get that point in other contexts. For example, it exempts hotel buses from its PCN regulations with no requirement that the bus be owned in common with the hotel: the exemption applies to all "corporations or persons . . . insofar as they own, *control, operate, or manage* . . . hotel buses." RCW 81.68.015 (emphasis added); *see also* WAC 480-30-011(6), (9).

b. That The Proposed Services Would Charge A Fare Is Irrelevant

The WUTC next argues that the Courtneys' proposed services would not be truly private because they would charge a fare for

transportation. That fact, too, is irrelevant to the nature of the services the Courtneys wish to offer.[6]

For its argument on this point, the WUTC returns again to *Self* and *Nelson*. It makes much of the fact that in *Self*, mill customers were not charged for transportation to the mill, *see* WUTC Br. at 25, and that in *Nelson*, the bus operator was paid a flat rate rather than a per-passenger fare. WUTC Br. at 27.

The WUTC's attempts to limit these cases fall flat. The Georgia Supreme Court, after all, expressly held—after *Self*—that "[a] private ferry . . . may take pay for ferriage." *Futch v. Bohannon*, 134 Ga. 313, 315, 67 S.E. 814 (1910). So, too, did the Ninth Circuit in *United Truck Lines v. United States*, 216 F.2d 396, 398 (9th Cir. 1954)—a case the WUTC does not even acknowledge, much less attempt to distinguish. And *Nelson*, again, turned on the fact that the bus transportation was for campground customers only, rather than "all persons . . . who apply for passage." *Nelson*, 65 Utah at 462. It did not turn on how the bus operator was paid.

[6] Relatedly, the WUTC argues that the fact that the Courtneys would "charge standard rates and apply identical terms of service to all paying customers" evinces the "public" nature of their proposed services. WUTC Br. at 17. The WUTC, however, *required* the Courtneys to specify rates and terms of service. The Courtneys first petitioned for a declaratory order without this information, and the WUTC *refused* to issue an order without it. CP 385, 390-91 (refusing to issue declaratory order until Courtneys provided certain "operational details," including "rates" and "[t]erms of service").

Arrow Launch, meanwhile, goes further than the WUTC, arguing that even *free* boat transportation for customers of a business is the operation of a public ferry. However, the primary case Arrow Launch cites in support of this proposition, *Hudspeth v. Hall*, 111 Ga. 510, 36 S.E. 770 (1900), does not support it. Although the facts in *Hudspeth* are not entirely clear, it appears that a business owner had previously used his boat to shuttle customers of his own business, *id*. at 512, and that he sought to expand this private ferry, without a license or franchise from the government, into a full-blown, free ferry open to the general public. *Id.* at 511, 512-13. More specifically, he claimed the right to shuttle persons traveling between Mitchell County and Newton, Georgia. *Id.* at 512-13. It was this expanded service that was at issue in the case—not the limited service for customers of the owner's business. The court, moreover, appears not to have enjoined the business owner from shuttling his own customers. Rather, it enjoined him from opening up his private ferry to the general public. *Id.* at 518. The case therefore does not support Arrow Launch's position.[7]

[7] Arrow Launch's reliance on *Shemwell v. Finley*, 88 Ark. 330, 114 S.W. 705 (1908), is equally unpersuasive. *Shemwell* concerned whether, under an Arkansas statute, persons who assist in repairing a ferry to make it operational may receive free passage on it. Its relevance to this case is, to say the least, difficult to understand. In fact, the only case that comes close to supporting Arrow Launch's position on this point is *Hatten v. Turman*, 123 Ky. 844, 97 S.W. 770 (1906), and its continued validity is in question. The case enforced an exclusive ferry franchise between West Virginia and Kentucky, but the U.S. Supreme Court subsequently held that an exclusive ferry franchise for service

c. That The Proposed Services Would Operate For Profit Is Irrelevant

Finally, the WUTC argues that the for-profit nature of the Courtneys' proposed services renders them "public." *See* WUTC Br. at 20-22. It makes this argument in responding to the Courtneys' discussion of *West Valley Land Co. v. Nob Hill Water Association*, 107 Wn.2d 359, 729 P.2d 42 (1986), in which the Washington Supreme Court held that "[t]he test used to determine if a corporation is to be regulated by the [W]UTC . . . 'is whether . . . the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility; or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.'" *Id.* at 365 (quoting *Inland Empire Rural Electrification, Inc. v. Dep't of Pub. Serv.*, 199 Wash. 527, 537, 92 P.2d 258 (1939)).[8] The WUTC attempts to distinguish this case on the ground that the water

---

between states violates the Commerce Clause. *Mayor of Vidalia v. McNeely*, 274 U.S. 676, 47 S. Ct. 758, 71 L. Ed. 1292 (1927).

[8] The WUTC insists that the Courtneys' proposed services *would* be available for use by "that portion of [the public] that can be served" by them. WUTC Br. at 22 (alteration in original) (quoting *W. Valley Land Co.*, 107 Wn.2d at 365). But the water company in *West Valley Land Company* "provide[d] water service to *any* property within its service area upon request" (so long as the property owner paid the requisite fees and the service was technically feasible), and the court held that even this extremely broad set of customers did not amount to "that portion of [the public] that could be served." *W. Valley Land Co.*, 107 Wn.2d at 367. Here, the Courtneys would provide service to a far narrower set: only those who are confirmed customers at Stehekin Valley Ranch or another business that has contracted with the Courtneys to provide transportation for its customers.

company at issue in it, Nob Hill Water Association, was a non-profit cooperative, whereas the Courtneys would operate for profit. That is a distinction without a difference.

The Washington Supreme Court cited the non-profit, cooperative nature of the Nob Hill as a *secondary* reason for concluding that it was not subject to regulation. "[O]f greater consequence," the court held, "[wa]s that Nob Hill ha[d] not dedicated or devoted its facilities to public use, nor ha[d] it held itself out as serving, or ready to serve, the general public." *Id.* at 366. The same is true of the Courtneys. Their services would thus be private, not public.

5. The State Constitution's Abhorrence Of Monopolies Is Relevant And Militates In Favor Of The Courtneys

Finally, as the Courtneys noted in their opening brief, the Washington Supreme Court has stressed that our state constitution "manifest[s] the state's abhorrence of monopolies" and therefore "makes it inappropriate to impute . . . a conferral of authority on the Commission to grant monopolies." *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 537, 538, 869 P.2d 1045 (1994). Neither the WUTC nor Arrow Launch disputes that the WUTC has granted a monopoly to the Lake Chelan Boat Company to provide boat transportation service on Lake Chelan. Instead, the WUTC insists that it has not "imput[ed]" the power to grant that

monopoly, but rather has "uph[eld] the express will of the legislature, as set forth in RCW 81.84." WUTC Br. at 29. RCW 81.84, however, only requires a PCN certificate for ferries that operate "for the public use." RCW 81.84.010(1). The WUTC's claim of authority thus begs the question: Are the Courtneys' services "for the public use"? As discussed above, they are not.

B. The Declaratory Order Is Arbitrary And Capricious

The Declaratory Order should also be set aside because it is "arbitrary [and] capricious." RCW 34.05.570(4)(c)(iii). First, it imposes a PCN requirement on the Courtneys' proposed boat services even though the WUTC does not require a PCN certificate for substantively identical transportation services in the non-waterborne context. Second, the Declaratory Order refuses to apply, to the Courtneys' fifth proposal, a regulation that exempts "charter service" from the ferry PCN requirement, even though that is the very type of service at issue in the fifth proposal.

1. The Declaratory Order Insists On A PCN Certificate For The Courtneys, While Exempting Substantively Identical Services In The Non-Waterborne Context

As the Courtneys explained in their opening brief, the Declaratory Order insists that the Courtneys obtain a PCN certificate for their proposed boat transportation services, even though the WUTC exempts substantively identical, surface transportation services—*e.g.*, hotel buses,

airline passenger vans, and persons who transport their own customers "as an incidental adjunct to some other established private business," WAC 480-30-011(6), (8) & (9)—from the need to obtain a certificate. This differential treatment of the Courtneys is arbitrary and capricious.[9]

The WUTC acknowledges that "the state cannot purport to regulate all carriers within a particular industry—i.e., both private and public carriers within an industry—but then arbitrarily exempt certain private carriers within the industry." WUTC Br. at 31; *see also Smith v. Cahoon*, 283 U.S. 553, 566-67, 51 S. Ct. 582, 75 L. Ed. 1264 (1931); *State ex rel. Dep't of Pub. Works v. Inland Forwarding Corp.*, 164 Wash. 412, 424-25, 2 P.2d 888 (1931). It claims, however, that this principle does not apply "*across* industries"—presumably meaning across the waterborne and surface transportation industries—and that "[t]he state may lawfully regulate different industries differently." WUTC Br. at 31, 32.

The WUTC's argument turns on a self-servingly narrow definition of "industry" and ignores the fact that the agency's regulatory charge concerns "transportation" broadly. RCW 80.01.040(2). It also ignores the

[9] The WUTC insists that these "exemptions apply solely to surface transportation providers" and are thus "inapplicable" to "the boat transportation services at issue in this case." WUTC Br. at 29, 30. The Courtneys, however, are not arguing that the WUTC "failed to apply [surface transportation] exemptions" to their proposed boat services, WUTC Br. at 30. They are arguing that the Declaratory Order treats substantively identical transportation services differently.

fact that the Washington Legislature has defined both "commercial ferries" *and* "auto transportation companies" as "common carrier[s]" subject to the WUTC's jurisdiction. RCW 81.04.010(11).

In any event, the WUTC's underlying position is wrong. The relevant question is whether the WUTC is "treat[ing] similar *situations* in different ways," whether within—or across—industries. *Seattle Area Plumbers v. Wash. State Apprenticeship & Training Council*, 131 Wn. App. 862, 879, 881, 129 P.3d 838 (2006) (emphasis added) (analyzing alleged differential treatment in electrical and plumbing apprenticeship expansion requests). As this Court explained in applying the "arbitrary or capricious" standard of review only two years ago, "[a]gencies should not treat similar situations differently and should strive for equal treatment." *Stericycle of Wash. Inc. v. Wash. Utils. & Transp. Comm'n*, 190 Wn. App. 74, 93, 359 P.3d 894 (2015).

In fact, the Washington Supreme Court has repeatedly invalidated regulatory schemes that treated separate industries differently when there was no valid reason for doing so. In *City of Spokane v. Macho*, 51 Wash. 322, 98 P. 755 (1909), for example, it invalidated a law that made false representations by employment agencies, but not other businesses, illegal and, in so doing, held that "no arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise

similar." *Id.* at 325 (quoting *State ex rel. McCue v. Ramsey*, 48 Minn. 236, 240, 51 N.W. 112 (1892)). And in *Pearson v. City of Seattle*, 199 Wash. 217, 90 P.2d 1020 (1939), the court invalidated a licensing scheme that "place[d] a burden upon the solid fuel industry which no other similar industry . . . [wa]s required to bear"; as the court stressed, the government's regulatory power "'must not be exercised arbitrarily.'" *Id.* at 221, 224 (quoting *City of Seattle v. Dencker*, 58 Wash. 501, 503, 108 P. 1086 (1910)); *see also State v. W.W. Robinson Co.*, 84 Wash. 246, 249-50, 146 P. 628 (1915) (invalidating ordinance that imposed onerous conditions on the sale of concentrated feed but that exempted cereal and flour mills).[10]

The same kind of arbitrary treatment is occurring here and warrants setting aside the Declaratory Order. It makes no difference that the arbitrariness spans waterborne and surface transportation.[11]

---

[10] Even assuming the WUTC is correct that the "arbitrary or capricious" inquiry must focus myopically on the ferry "industry" specifically, as discussed below, the WUTC exempts "[c]harter services" from the PCN requirement for ferries, *see* WAC 480-51-022(1), while insisting that the Courtneys' fifth proposal, which would provide charter service, requires a PCN certificate.

[11] Arrow Launch insists that the differential treatment is "reasonable" because "[t]he auto transportation industry is highly competitive, with numerous other modes of transportation existing to transport passengers should an incumbent provider's business fail." Arrow Launch Br. 37. The argument proves too much: the lack of "competition" and "other modes of transportation" in the waterborne context is a direct result of the PCN requirement itself.

2. The WUTC Arbitrarily Refused To Treat The Courtneys' Fifth Proposal As An Exempt Charter Service

As noted in the Courtneys' opening brief, *see* Opening Br. at 45-50, the WUTC exempts "[c]harter service[]" from the PCN requirement for ferries, WAC 480-51-022(1), and the Courtneys' fifth proposal falls squarely within the WUTC's definition of that term: "the hiring of a vessel, with captain and crew, by a person or group for carriage or conveyance of persons or property." WAC 480-51-020(14). Nevertheless, the Declaratory Order holds that this proposal *requires* a PCN certificate, ignoring the WUTC's own definition of "charter service" and relying instead on the more demanding and restrictive definition of "charter carrier" from a chapter of the administrative code governing companies that provide surface passenger transportation. *See* Opening Br. at 46-47; CP 436 (¶ 19 & n.17) (relying on WAC 480-30-036).[12]

The WUTC does not dispute that the Declaratory Order ignored the proper term and definition. And even now, it does not encourage this Court to apply the correct term and definition, knowing that if it did, the

[12] It is particularly capricious for the WUTC to rely on the "charter carrier" definition in the regulations governing surface transportation when it refuses to even *consider* the provisions in the same regulations that exempt, from the PCN requirement, hotel buses, airline passenger vans, and transportation of customers as an adjunct to another business.

Court would conclude that the service in the Courtneys' fifth proposal is, indeed, an exempt "charter service."[13]

Instead, the WUTC argues that the Courtneys' service would not be "'private' within the common law understanding of common carriage" because, to be considered private, a charter must be "a one-time, custom use negotiated between the operator and the chartering party." WUTC Br. at 33 (citing *Cushing*, 101 Wash. at 181).[14] Yet that is precisely the type of service the Courtneys would provide: the Stehekin-based travel company would enter into individual, custom charter agreements for the transportation of its customers, with the charter agreements turning on the specific needs of the travel company based on the travel packages it has sold for that particular occasion and the destinations they involve. *See* CP

[13] Arrow Launch argues that "th[is] Court should defer to the [W]UTC" insofar as it looked to the "charter carrier" exemption, claiming "an administrative agency's interpretation of law which pertains to the area of the agency's expertise is given substantial deference by the courts." Arrow Launch Br. at 39, 40. The problem, however, is not one of interpretation, but rather of applying the *wrong* provision of law, which is, in itself, arbitrary and capricious. *Byars v. Coca-Cola Co.*, No. 1:01-CV-3124-TWT, 2006 WL 2523095, at *6 (N.D. Ga. Aug. 28, 2006), *aff'd in part and vacated in part on other grounds*, 517 F.3d 1256 (11th Cir. 2008).

[14] Tellingly, the WUTC omits the sentence immediately preceding the one it quotes from *Cushing*, which states plainly that "a 'common carrier' is one . . . who holds himself out to the world as *ready and willing to serve the public indifferently* in the particular line or department in which he is engaged." *Cushing*, 101 Wash. at 181 (emphasis added); *see also id.* at 178 ("'A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage.'" (quoting *McGregor v. Gill*, 114 Tenn. 521, 524, 86 S.W. 318 (1905))). Obviously, boat transportation like that in the Courtneys' fifth proposal, which would serve, by charter, a single, Stehekin-based travel company, is not one that "holds [it]self out to the world as ready and willing to serve the public indifferently." *Id.*

69 (noting that "[c]ustomers of the Stehekin-based travel company would purchase packages directly from the company" and that "[t]he company, in turn, would charter transportation for those customers by private charter agreement" for service to "points on Lake Chelan as needed by the travel company to provide transportation in connection with the packages its customers have purchased").

Undeterred, the WUTC (along with Arrow Launch) insists that the fifth service *still* will not "operate as a true charter" because it will not transport "cohesive groups" for a "common purpose." WUTC Br. at 33; *see also* Arrow Launch Br. at 39. These two requirements, however, appear nowhere in the WUTC's definition of "charter service." In fact, the WUTC's own definition expressly rejects a "cohesive group" requirement, stating that a charter arrangement may be made by a "by a *person* or group." WAC 480-51-020(14) (emphasis added).

Nevertheless, the WUTC and Arrow Launch attempt to graft a "cohesive group" requirement onto the definition of "charter service" from an Oregon statute that defined the same term. But the plain language of the Oregon statute *required* that charter arrangements be made by a "'complete, cohesive group.'" *Iron Horse Stage Lines, Inc. v. Pub. Util. Comm'n of Or.*, 125 Or. App. 671, 677, 866 P.2d 516 (1994) (De Muniz,

J., dissenting). The WUTC's definition of "charter service" has no such requirement.

Nor does the WUTC's definition require that a charter be for a "common purpose." Again, the WUTC and Arrow Launch are attempting to import this requirement from the Oregon definition of the term "charter service" (or from Washington's definition of the term "charter carrier," which, as discussed above, appears in an inapplicable chapter of the Washington Administrative Code governing surface transportation companies). *See id.* (quoting Oregon statutory definition of "charter service" that required, among other things, "a common trip purpose"); WAC 480-30-036(2) (defining "charter carrier" as requiring, among other things, "a common purpose").

But even if a "common purpose" were a requirement of a "charter service" under Washington law, the service at issue in the Courtneys' fifth proposal would easily satisfy it. In fact, in the very case the WUTC relies upon, *Iron Horse Stage Lines, Inc.*, the Oregon Public Utilities Commission determined that a similar arrangement—by which a travel broker signed up passengers for bus service between Eugene and the Willamette Pass ski area and then contracted with bus companies to provide the transportation—satisfied Oregon's "common trip purpose" requirement. *Iron Horse Stage Lines*, 125 Or. App. at 673-74; *id.* at 677

(De Muniz, J., dissenting) ("[U]se of recreational facilities at a destination constitutes a 'common trip purpose' even though the recreation might not be identical for each passenger.").[15]

The WUTC and Arrow Launch next maintain that the service in the Courtneys' fifth proposal is no different than the one that the Washington Supreme Court found impermissible in *Kitsap County Transportation Company*. *See* WUTC Br. at 33-35; Arrow Launch Br. at 26-29. As the Courtneys' noted in their opening brief, however, when that case was decided, there was no exemption for charter services—a point that the WUTC and Arrow Launch do not acknowledge, much less dispute. Opening Br. at 49. There is now, and the Courtneys' fifth proposal falls squarely within it.

There are, moreover, critical differences between the service at issue in *Kitsap County Transportation Company* and the one here. *See* Opening Br. at 49-50. Most importantly, the service that the court found impermissible in *Kitsap County Transportation Co.* was just a "pretense" for a public ferry "open to all who might desire transportation between Seattle and Bainbridge Island." *Kitsap County Transportation Co.*, 176 Wash at 494, 495. Although an "association" in the case claimed to have

[15] While the dissent in *Iron Horse Stage Lines, Inc.* agreed with the Oregon Public Utilities Commission, the majority did not reach the issue. *See Iron Horse Stage Lines, Inc.*, 125 Or. App. at 676 (De Muniz, J., dissenting).

entered a charter agreement to secure boat transportation for its members, membership was "open to all" and the association's only purpose was to funnel passengers to a ferry that ran "on a regular schedule of ten round trips daily." *Id.* at 494. Here, by contrast, the charter agreements would be entered into by a travel company to secure transportation for customers who have purchased *other* services and activities from the travel company, and the service would only operate "on days and at times" needed by the travel company. CP 68-69.[16]

Finally, Arrow Launch cites several examples of how the Courtneys' fifth proposal is "sufficiently vague as to permit a ferry operation which is fully open to the public," Arrow Launch. Br. at 40, but each example is rooted in conjecture and refuted by the record. Specifically,

- Arrow Launch speculates that the "travel packages" offered by the Stehekin-based travel company might "involve[] nothing more than the transportation itself," Arrow Launch Br. at 41, despite the fact that the term "package" means "[a] set of . . . commercial products . . . offered or agreed as a whole," *Oxford*

[16] Contrary to the WUTC's suggestion, the travel company would not be a "'shell company' to process reservations" for Jim and Cliff's transportation service. WUTC Br. at 33. It would offer *bona fide* travel packages and, as the Declaratory Order determined, would "not [be] affiliated with the Courtneys." CP 430 (¶ 2).

English Dictionary (3d ed. March 2005),[17] and despite the fact that the Courtneys' petition for a declaratory order states that "the travel packages would include lodging, meals, and/or other activities or services," CP 68.

- Arrow Launch speculates that the Stehekin-based travel company offering the travel packages might "be owned by a parent-corporation owned by Jim and Cliff Courtney," Arrow Launch Br. at 41, despite the fact that the Courtneys' petition for a declaratory order states that it "would not be owned by Cliff, Jim, or other Courtney family members," CP 68, and despite the fact that the WUTC's Declaratory Order determined that it would "not [be] affiliated with the Courtneys," CP 430 (¶ 2).
- Arrow Launch speculates that the Stehekin-based travel company "might consist of something as simple as a mobile phone application, . . . which would be used for paying the fare *upon arrival*," Arrow Launch Br. at 41 (emphasis added), despite the fact that the Declaratory Order stated that

[17] The *Oxford English Dictionary* includes this compound usage for "package": "Designating or relating to holidays or tours organized by an agent, with arrangements for transport, accommodation, etc., offered at an inclusive price"—*e.g.*, "'package' tours offered by the travel agencies." *Oxford English Dictionary* (3d ed. March 2005).

> "[p]assengers would be restricted to persons who *have purchased* a travel package," CP 430 (¶ 2) (emphasis added), and despite the fact that the Courtneys' petition for a declaratory order states that the travel company, "*in turn*, would charter transportation for those customers," CP 69 (emphasis added).

In short, there is simply no basis for Arrow Launch's conjecture and ultimate assertion that the Courtneys' fifth proposal is a "sham" designed to mask a full-blown, public ferry. Arrow Launch Br. at 42.

VI. CONCLUSION

For the forgoing reasons and those discussed in the Courtneys' opening brief, the Courtneys respectfully request that this Court: (a) set aside Declaratory Order 01 in WUTC Docket TS-151359; and (b) enter a declaratory judgment order declaring that a certificate of public convenience and necessity is not required to provide boat transportation service on Lake Chelan for customers or patrons of a specific business or group of businesses under the circumstances described in paragraphs 74-123 of the Courtneys' petition for a declaratory order.

Respectfully submitted this 4th day of August, 2017.

s/ Michael E. Bindas
Michael E. Bindas, WSBA # 31590
INSTITUTE FOR JUSTICE
10500 N.E. 8th Street, Suite 1760
Bellevue, WA 98004
Telephone: (425) 646-9300
Facsimile: (425) 990-6500
Email: mbindas@ij.org

PROOF OF SERVICE

I, Michael E. Bindas, hereby certify that on August 4, 2017, I filed the foregoing *Reply Brief of Appellants James and Clifford Courtney* through the Court's electronic filing system. I further certify that on August 4, 2017, I caused to be served a copy of the foregoing *Reply Brief of Appellants James and Clifford Courtney* by messenger delivery to the following:

Julian H. Beattie
Assistant Attorney General
Utilities and Transportation Division
1400 S Evergreen Park Dr. SW
P.O. Box 40128
Olympia, WA 98504-0128
Attorney for Respondents Washington Utilities and Transportation Commission, David Danner, Ann Rendahl, Jay Balasbas, and Steven King

David W. Wiley
Blair Fassburg
Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Attorneys for Intervenor-Respondent Arrow Launch Service, Inc.

Hon. Bob Ferguson
Office of the Attorney General of the State of Washington
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

I further certify that on August 4, 2017, I caused to be mailed a copy of the foregoing *Reply Brief of Appellants James and Clifford Courtney* by First Class U.S. mail, postage prepaid, to:

Jack Raines
President
Lake Chelan Recreation, Inc.
d/b/a Lake Chelan Boat Company
P.O. Box 186
Chelan, WA 98816

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of August, 2017, in Bellevue, Washington.

s/ Michael E. Bindas
Michael E. Bindas
INSTITUTE FOR JUSTICE
10500 N.E. 8th Street, Suite 1760
Bellevue, WA 98004
Telephone: (425) 646-9300
Facsimile: (425) 990-6500
Email: mbindas@ij.org
Attorney for Appellants James and Clifford Courtney

INSTITUTE FOR JUSTICE

August 04, 2017 - 3:03 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35095-9
Appellate Court Case Title:	James Courtney, et al v Washington Utilities and Transportation, et al
Superior Court Case Number:	15-2-01015-2

The following documents have been uploaded:

- 350959_Briefs_20170804150123D3664242_4962.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was Appellants Reply Brief FINAL TO FILE 08 04 2017.pdf

A copy of the uploaded files will be sent to:

- bfassburg@williamskastner.com
- dwiley@williamskastner.com
- jbeattie@utc.wa.gov

Comments:

Sender Name: Casey Dainsberg - Email: cdainsberg@ij.org
Filing on Behalf of: Michael E Bindas - Email: mbindas@ij.org (Alternate Email: cdainsberg@ij.org)

Address:
10500 NE 8th Street
Suite #1760
Bellevue, WA, 98004
Phone: (425) 646-9300

Note: The Filing Id is 20170804150123D3664242